Husli @ Husly bin Mok v Jundar Realty Development Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02–251 OF 2010
MOHD HISHAMUDIN, ABDUL WAHAB PATAIL AND BALIA YUSOF JJCA
5 FEBRUARY 2014

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Civil Procedure — Originating summons — Whether appropriate — Conflicting affidavit evidence — Whether proceedings should have been commenced by writ — Whether judge should have allowed oral application to convert originating summons to writ action — Rules of the High Court 1980 O 28 r 8(1)

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The appellant was the administrator of the deceased owner of two parcels of land ('the lands') who, during his lifetime, had appointed the first respondent ('Jundar Realty') to develop the lands into a housing estate. Jundar Realty failed to carry out any work on the lands. Following the deceased's death, the appellant discovered that one of the lands had been fraudulently transferred to Jundar Realty. An originating summons ('OS') filed in the High Court by the appellant to recover the land from Jundar Realty saw the parties to the dispute filing a total of 16 contentious affidavits where allegations of fraud and fraudulent misrepresentation were raised and denied. In view of the conflicts in the affidavit evidence, the appellant, at the hearing of the OS, orally applied for the matter to be converted to a writ action under O 28 r 8(1) of the Rules of the High Court 1980 ('RHC'). The application was refused by the judge who continued to hear the matter as an OS and dismissed it after finding the appellant had failed to specifically plead the allegations of fraud and fraudulent misrepresentation as was required under O 28. The instant appeal was against that decision.

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Held, allowing the appeal, setting aside the High Court's order and remitting the matter back to the High Court to be heard de novo as a writ action:

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(1) In the light of the conflicts in the evidence, the High Court judge should have acceded to the appellant's oral application and converted the OS to a writ action and proceeded with the matter in the manner prescribed by O 28 r 8(1) of the RHC (see para 20).

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(2) On examining the affidavits, the court disagreed with the High Court's finding that the appellant's affidavits did not disclose any particulars of fraud or fraudulent misrepresentation (see para 22).

(3) It was implicit under O 5 r 4(2)(b) of the RHC that if there was likely to

be substantial dispute as to facts, the proceedings should be begun by writ rather than by originating summons (see para 15).

[Bahasa Malaysia summary

Perayu adalah pentadbir dua bidang tanah pemilik si mati ('tanah tersebut') yang semasa hidupnya, telah melantik responden pertama ('Jundar Realty') untuk membangunkan tanah tersebut kepada kawasan perumahan. Jundar Realty gagal menjalankan apa-apa kerja ke atas tanah tersebut. Berikutan kematian si mati, perayu mendapati bahawa salah satu daripada tanah tersebut telah dipindahkan secara palsu kepada Jundar Realty. Saman pemula ('SP') difailkan di Mahkamah Tinggi oleh perayu untuk mendapatkan semula tanah tersebut daripada Jundar Realty melibatkan pihak-pihak kepada pertikaian memfailkan sejumlah 16 afidavit perdebatan di mana tuduhan pemalsuan dan salah nyata fraud dibangkitkan dan dinafikan. Mengambil kira konflik di dalam keterangan afidavit, perayu, semasa pendengaran SP, secara lisan memohon untuk perkara tersebut ditukarkan kepada tindakan writ di bawah A 28 k 8(1) Kaedah-Kaedah Mahakmah Tinggi 1980 ('KMT'). Permohonan telah ditolak oleh hakim yang terus mendengar perkara tersebut sebagai SP dan menolaknya selepas mendapati perayu gagal untuk secara spesifik memplid tuduhan pemalsuan dan salah nyata fraud di bawah A 28. Rayuan ini adalah terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan, mengenepikan perintah Mahkamah Tinggi dan meremit perkara kepada Mahkamah Tinggi untuk didengar *de novo* sebagai tindakan writ:

(1) Berdasarkan konflik dalam keterangan, hakim Mahkamah Tinggi patut menyetujui kepada permohonan lisan perayu dan menukarkan SP kepada tindakan writ dan meneruskan dengan perkara tersebut dalam cara yang ditetapkan oleh A 28 k 8(1) KMT (lihat perenggan 20).

(2) Dalam memeriksa afidavit, mahkamah tidak bersetuju dengan dapatan Mahkamah Tinggi bahawa afidavit perayu tidak mengemukakan apa-apa butir mengenai pemalsuan atau salah nyata fraud (lihat perenggan 22).

(3) Adalah tersirat di bawah A 5 k 4(2)(b) KMT bahawa jika mungkin menjadi pertikaian substansial terhadap fakta, prosiding sepatutnya dimulakan dengan writ bukan saman pemula (lihat perenggan 15).]

Notes

For cases on whether appropriate, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5849–5853.

Cases referred to

Ting Ling Kiew & Anor v Tan Eng Iron Works Co Ltd [1992] 2 MLJ 217, SC (refd)

Legislation referred to

Rules of the High Court 1980 O 5 r 4(2)(b), O 28 r 8(1)

Appeal from: Originating Summons No 24–129 of 2010 (High Court, Miri)

Bong Ah Loi (Suhaili Bong) for the appellant.
Zalina bt Yacob (Director-General of Insolvency) for the Director-General of Insolvency.
Rajesh Jethi (Jethi & Associates) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court of Sabah and Sarawak, at Miri, of 1 December 2009. The High Court had dismissed the appellant's/plaintiff's originating summons action against the respondents/defendants.

[2] On 17 June 2013 we, unanimously, allowed the appeal (with costs in the cause).

(At the outset of the hearing of this appeal the parties informed the court that there are three other related appeals, namely:

(a) Q-02–2986 of 2010;

(b) Q-02–2153 of 2010; and

(c) Q-02–2154 of 2010.

[3] The parties agreed that the decision of this court on Civil Appeal No Q-02–251 of 2010, that is to say, the present appeal, would bind these three appeals.)

[4] We shall now give our grounds.

[5] We allowed the appeal but only on one ground: that the learned High Court judge, with respect, had erred in law in not allowing the appellant's/plaintiff's oral application, at the commencement of the hearing at the High Court of the originating summons action against the respondents/defendants, that, in the light of the fact that there are serious disputes as to material facts. The matter ought to have been proceeded with as a writ action, and not by way of an originating summons.

[6] The prayers in the appellant's/plaintiff's originating summons are for:

(a) a declaration that an agreement dated 9 August 1988 made between one

Utet bt Telajan (since deceased) and the first respondent/first defendant, to develop two parcels of land (one of which is Lot 1092) in the District of Miri, be rescinded;

(b) a declaration that a deed of settlement dated 4 August 2003 made between the first respondent/first defendant and the appellant/plaintiff (together with a deed of variation dated 24 August 2004 to vary the deed of settlement) be declared null and void.

[7] The deceased, Utet, was the registered proprietor of two parcels of land (one of which is Lot 1092) ('the said lands') in the District of Miri. By an agreement dated 9 August 1988, made between the deceased and the first respondent/first defendant, the deceased appointed the first respondent/first defendant to develop the said lands into a housing estate. In consideration of the appointment, the first respondent/first defendant agreed to construct six units of semi-detached house on the said lands for the deceased. However, the first respondent/first defendant failed to develop the said lands. In fact, the first respondent/first defendant did not even commence any work on the said lands.

[8] The deceased died intestate on 4 July 1989. The appellant/plaintiff, Husly, is the administrator of the estate of Utet.

[9] The appellant/plaintiff, as administrator of the estate of Utet, commenced an originating summons action, namely, originating summons No 24–207 of 1999 (MR), against the first respondent/first defendant for breach of the agreement ('the first originating summons action').

[10] It is, however, alleged by the appellant/plaintiff that, subsequent to the commencement of this first originating summons action, there wasa representation made by the first respondent/first defendant to the appellant/plaintiff through the first respondent's/first defendant's solicitors,namely, Messrs Kadir Wong Lin & Co, to the effect that the first respondent/first defendant offered the appellant/plaintiff RM400,000 for the withdrawal of the first originating summons action and to settle the matter amicably, and that the appellant/plaintiff was to execute a deed of settlement with the first respondent/first defendant. The deed of settlement was prepared by the first respondent's/first defendant's solicitors, Messrs Kadir Wong Lin & Co. The appellant/plaintiff, being an uneducated man, accepted the offer and executed the deed of settlement (and thereafter the agreement to vary the deed of settlement) under the belief that the deed only concerned the withdrawal of the first originating summons action and the payment of RM400,000. It is also alleged by the appellant/plaintiff that it was not explained to him either by the first respondent/first defendant or by the first respondent's/first defendant's solicitors (Messrs Kadir Wong Lin & Co) that the deed of settlement contains a term that the plaintiff was to transfer the said lands to the first

respondent/first defendant. Had he known that the deed contains such a term he would not have signed the same. Further, it is alleged that although it was never provided for in the deed of settlement, the first respondent/first defendant and Messrs Kadir Wong Lin & Co had secured the appellant/plaintiff to sign a power of attorney purportedly appointing the first defendant as his attorney in respect of the said lands. Subsequently, the first respondent/first defendant, without the knowledge of the appellant/plaintiff, executed a deed of substitution of power of attorney affecting the said lands to substitute the second respondent/second defendant, namely, Premier Sigma Sdn Bhd as attorney to the appellant/plaintiff in place of the first respondent/first defendant.

[11] The appellant/plaintiff further alleges that he subsequently discovered that one of the said lands, namely, Lot 1092, had been fraudulently transferred to the first respondent/first defendant. Hence, the appellant/plaintiff filed another originating summons action('the second originating summons action') to recover the said land from the first respondent/first defendant.

[12] The decision under this second originating summons action is the subject matter of the present appeal.

[13] For the purpose of the second originating summons action, the appellant/plaintiff filed nine affidavits, whilst the respondents/defendants filed seven affidavits. All are contentious affidavits. The appellant/plaintiff, in his affidavits, makes allegations of fraud and fraudulent misrepresentation against the respondents/defendants, which allegations are denied by the latter.

[14] In our judgment, it should have been obvious to all parties (including the learned High Court judge) at the proceedings of the originating summons that, in view of the serious allegations and disputes as to facts, as revealed by the affidavits of both sides, that it was inappropriate that the proceedings be disposed of solely on affidavit evidence. Order 5 r 4(2)(b) of the Rules of the High Court 1980 provides:

> 4 Proceedings which may be begun by writ or originating summons (O 5 r 4)
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> (2) Proceedings
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> (a) …
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> (b) in which there is unlikely to be any substantial disputeof fact, are appropriate to be begun by originating summons …

[15] Thus O 5 r 4(2)(b) implies that if there is likely to be a substantial dispute as to fact, then it is inappropriate to commence an action by originating summons; instead, it must be begun by a writ action.

[16] Be that as it may, the respondents/defendants did not apply to the court for the originating summons to be converted to a writ action. Instead, they insisted at the hearing of the second originating summons action that the hearing be proceeded withas an originating summons action and based on the affidavit evidence; notwithstanding the fact that the affidavits disclosed several contentious issues as to facts and that the issues could not be appropriately disposed off by way of affidavit evidence only.

[17] On the other hand, the appellant/plaintiff, the party who had erroneously filed the action by way of an originating summons, did, at the hearing of the originating summons, orally applied through his counsel, for the matter to be converted to a writ action.

[18] The learned High Court judge, however, turned down the appellant's/plaintiff's oral application and ordered the hearing to proceed forth with as an originating summons action and called for submissions based on the affidavit evidence. In his grounds of judgment, the learned judge said:

> As to the plaintiff's counsel application to convert this OS to writ, I found there is no specific prayer to invoke O 28 Rules of the High Court. The particulars depended by the Plaintiff are fraud and fraudulent misrepresentation which has not been specifically pleaded as required under O 28. I am guided by the decision in the Supreme Court case of *Ting Ling Kiew & Anor v Tan Eng Iron Workers Co Ltd* [1992] 2 MLJ 217 which stated, inter alia, (at p 227):
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> In such a case as the present where fraud or intention to defraud is the central issue we agree that the particulars of fraud must be specifically pleaded and it is obvious that the particulars of fraud are absent in the affidavit of the manager of the respondent company. On this point we find strong support in the case of *Walingford v Mutual Society* [1880] 5 AC 685, particularly in the speeches of Lord Selborne (who) said (at p 697):
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> With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud which any Court ought to take notice. And here I find nothing but perfectly general and vague allegations of fraud. No single material of fact is condescended upon, in a manner which would enable any Court to understand what it was that was alleged to be fraudulent …

[19] Having considered the submissions, the learned High Court judge dismissed the second originating summons action based on the merit of the application, based on the affidavit evidence. The learned High Court judge, relying on the affidavits, made findings of mixed law and facts that there are no fraud or fraudulent misrepresentation being established by the appellant/plaintiff.

[20] In our judgment, it is here that the learned High Court judge, with respect, erred. In the light of the conflicts in the evidence, he should have acceded to the appellant's/plaintiff's oral application and converted the originating summons action to a writ action and proceeded with the matter in the manner as prescribed by O 28 r 8(1) of the Rules of the High Court 1980: to order that the affidavits be deemed to be pleadings, with liberty to any party to apply for particulars; or, alternatively, to issue directions tothe parties to file their respective pleadings (statement of claim, statement of defence, etc). Order 28 r 8 (1) provides:

> 8 Continuation of proceedings as if cause or matter begun by writ (O 28 r 8)
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> (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

[21] In *Ting Ling Kiew v Tan Eng Iron Works*, Jemuri Serjan CJ (Borneo) said (at p 227):

> Unquestionably, these conflicts in the evidence can only properly and satisfactorily resolved if oral evidence is adduced and witnesses cross-examined on their evidence which, however, is not possible in proceedings begun by originating summons.

[22] With respect, having examined the affidavits, we disagree with the finding of the learned High Court judge that the appellant's/plaintiff's affidavits do not disclose any particulars of fraudulent misrepresentation or fraud. It is likely then that the matter would have to be adjourned for the trial to be held; for witnesses to testify and to be cross-examined. But, for this adjournment, the High Court could have compensated the respondents/defendants with costs, since it was the appellant/plaintiff who started the problem by erroneously commencing the proceedings as an originating summons action.

[23] (We set aside the order of the High Court, and we directed that the matter be remitted to the High Court to be heard de novo as a writ action before another judge. We issued directions as to the filing and serving of pleadings.)

A *Appeal allowed, High Court's order set aside and matter remitted back to the High Court to be heard de novo as a writ action.*

Reported by Ashok Kumar

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